No. 16-499

In the
Supreme Court of the United States

JOSEPH JESNER, *et al.*,

Petitioners,

vs.

ARAB BANK, PLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* JACK BLOOM and ALPHA CAPITAL HOLDINGS, INC.

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INTEREST OF *AMICI CURIAE*[1]

Amici are experts in the regulation of financial institutions. They have substantial background in and experience with banking oversight in the New York area. Members of the *amici* include Jack Bloom and Alpha Capital Holdings, Inc.

Jack Bloom is an investment banker and senior management advisor at Alpha Capital Holdings, Inc., a strategic and financial advisory firm that has been providing investment-banking services for more than 30 years. He was an adviser to the U.S. Congress regarding the Dodd-Frank Wall Street Reform Act, signed into law July 21, 2010 by President Obama. He graduated with honors from Harvard College in 1979 and from the MIT Sloan School of Management with an MBA in 1983.

Amici have a strong interest in the U.S. Supreme Court granting *certiorari* and reversing *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2d Cir. 2015). That decision incorrectly immunizes corporations for acts related to terrorism, genocide, and human trafficking.

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[1] No counsel for a party authored any portion of this brief, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* provided timely notice to the parties of their intent to file an *amicus* brief and received letters from the parties consenting to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The United States, and the financial services community in particular, have vital interests in preventing the use of U.S. bank accounts to facilitate terrorism—and in making sure the Alien Tort Statute ("ATS") is available as a tool to combat human rights violations such as genocide and human trafficking. New York State's banking system is at the center of the banking world and is a primary center for dollar-clearing activities. Yet unscrupulous international actors, including terrorist groups and juridical entities aiding and abetting in human rights violations, use the banking system to fund their illicit operations.

The Second Circuit's decision to eliminate ATS liability for financial institutions that operate as corporations has enormous negative financial implications for U.S. banks. Because billions of dollar-clearing transactions occur every day in New York, U.S. banks need to rely on other banks to filter out illicit transactions. But U.S. banks will be unable to rely on foreign banks' internal operating procedures to root out suspicious transactions if those other banks have no fear of liability under the ATS. This in turn requires U.S. banks to spend even more resources monitoring suspicious transactions (and essentially makes the task impossible) where the burden of doing so should really be borne by foreign banks. Victims of terror then look to U.S. banks for compensation for their injuries even when the real at-fault party is the foreign bank with insufficient internal safeguards.

As the U.S. Congress, the Executive Branch, numerous circuit courts, and the State of New York have all recognized, the law should encourage all financial institutions to closely monitor transactions to prevent funds from going to terrorist groups or other human rights violators. By eliminating ATS liability for financial institutions, the Second Circuit has taken away an important tool, in the most important financial hub in the world, for insuring that nefarious transactions are prevented.

This Court should grant *certiorari* to examine these issues of national importance and reverse the Second Circuit's ruling in order to prevent U.S. banks from shouldering the costs of preventing illicit transactions alone and to deter the financing of terrorism and other human rights violations.

ARGUMENT

I. The Second Circuit's Ruling Improperly Allows Foreign Banks to Maintain Minimal Anti-Money Laundering Safeguards While Shifting the Cost of Doing Business—and Any Potential Resulting Liability—to U.S. Banks.

In 2001, the U.S. Congress found that foreign banks' use of correspondent accounts in the United States "undermines the U.S. financial system [and] burdens U.S. taxpayers and consumers."[2] It further determined that insufficient safeguards existed to prevent illicit correspondent banking. Instead, most U.S. banks had allowed any bank holding a license issued by a foreign jurisdiction to qualify for a correspondent account "because U.S. banks should be able to rely on the foreign banking license as proof of the foreign bank's good standing."[3] Subsequent Congressional hearings elicited additional comments as to the effects of this practice:

> We cannot fight for human rights in all parts of the globe and then let corrupt public officials from other countries steal from their own people and place corrupt funds in U.S. bank accounts to enjoy the safety and soundness of the U.S. banking system. Money laundering not only finances crime, it pollutes international banking systems, it impedes the international fight against

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[2] *See* S. Permanent Subcomm. on Investigations, *Correspondent Banking: A Gateway for Money Laundering*, S. Rep. No. 107-1, at 1 (2001) (hereinafter "February 2001 Senate Report").

[3] *Id.* at 2.

> corruption, it distorts economies, and it undermines honest government.[4]

In short, U.S. banks did not want to expend money to monitor transactions of foreign banks, assuming instead that those banks would perform their own due diligence. Much of this was out of necessity because performing due diligence of a foreign bank, thousands of miles away, in a foreign language, is difficult.[5] But the presumption that foreign banks would perform their own due diligence has proved incorrect in some circumstances and has allowed foreign banks to use accounts in the United States to facilitate human rights violations and terrorism.

If the Second Circuit's holding precluding ATS liability for corporations is allowed to stand, that is one less tool terror victims and regulators have to coerce foreign banks to comply with internationally recognized anti-money laundering rules. Instead, U.S.

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[4] *See Role of U.S. Correspondent Banking in International Money Laundering: Hearings Before the S. Permanent Subcomm. on Investigations, Comm. on Governmental Affairs* (S. Hrg. 107-84), 107th Cong., at 7 (Mar. 1, 2, & 6, 2001) (statement of Sen. Carl Levin) (hereinafter "March Senate Hearings").

[5] Indeed, in the March Senate Hearings, David Weisbrod, Senior Vice President of Chase Manhattan Bank's Treasury Services Division confirmed that 93% of the hundreds of thousands of wire transactions the bank processed on a daily basis were entirely automated with no manual intervention. *See* March Senate Hearings, at 27. He also noted that performing due diligence of foreign banks is "no easy task" as information is often hard to obtain in foreign jurisdictions, and the information that is obtained may be difficult to evaluate in light of language barriers and travel costs. *See id.* at 29. U.S. taxpayers have also spent over $600 million a year to combat money laundering. *See* March Senate Hearings, at 7.

banks will be (and have been) forced to expend more resources conducting due diligence for high-risk foreign banks even though the financial burden of these checks should be borne by foreign banks.[6] Indeed, in the hearings conducted shortly before Congress passed the USA PATRIOT Act ("Patriot Act"),[7] Paul O'Neill, the Secretary of the Department of the Treasury, confirmed that a "global campaign" was needed to combat terror financing, not just compliance from U.S. banks.[8] He further maintained that this campaign was "as important as a military campaign," and "that an aggressive hunt for terrorist funds is underway and merits the cooperation of all countries."[9]

Instead of this "global campaign" Secretary O'Neill envisioned, U.S. banks have borne much of the burden of legal compliance even after Senators Grassley, Kerry, and Levin commented that U.S. regulations should not "create a competitive advantage for one type of financial institution over another."[10]

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[6] Further, performing due diligence is made even more difficult because foreign customers typically use shell corporations to conceal the true source of funds. *See* February 2001 Senate Report, at 1-2, 14-15.

[7] Pub. L. No. 107-56, §§ 302(a)-(b), 115 Stat. 272 (2001).

[8] *See Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H.R. Comm. on Fin. Servs.* (H. Hrg. 107-64), 107th Cong., at 8 (Oct. 3, 2001) (hereinafter "October House Hearings").

[9] *Id.*

[10] *See* Comment Letters on Notice of Proposed Rulemaking, Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts, 67 Fed. Reg. 37736, Comment Number 33: "Senators Charles E. Grassley, John Kerry, Carl Levin. Proposed Rule

Perhaps more importantly, the failure to appropriately deter foreign banks from financing terrorism under the ATS may subject U.S. banks to costly lawsuits. Senator Levin recognized this in his remarks at the Senate Hearings:

> The result is that U.S. banks, through their correspondent account services, become aiders and abettors, unwittingly—but aiders and abettors, nonetheless—of laundering the proceeds of drug trafficking or financial fraud or tax evasion or Internet gambling or other illegal acts.[11]

For example, in *Licci v. Lebanese Can. Bank, SAL*,[12] terror victims sued not just LCB for processing financial transactions from known terrorists, but also American Express ("AMEX") for maintaining the correspondent account LCB used to complete the transactions. While the court ultimately dismissed AMEX, the risk of substantial liability to AMEX was real.[13]

Implementing Section 312 on Anti-Money Laundering Due Diligence Policies, Procedures and Controls." October 11, 2002, at 1 (internal quotation marks omitted), *available at* https://www.fincen.gov/sites/default/files/shared/grassley.pdf (hereinafter "Senator Comment Letter").

[11] March Senate Hearings, at 7 (statement of Sen. Carl Levin).

[12] 672 F.3d 155 (2d Cir. 2012).

[13] *See, e.g.*, *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192 (1st Dep't 2013) (disagreeing with Second Circuit's analysis in *Licci* and holding that Bank of China could be liable for injuries to Israeli citizens).

The Second Circuit's ruling immunizing foreign banks from ATS liability does nothing to help ensure that foreign banks play by the rules. Instead, limiting liability for foreign banks shifts the cost of compliance with banking laws—and the risk of failing to comply with them—to U.S. banks. But domestic banks alone should not have to bear the additional monitoring costs associated with terrorism.[14] This High Court should grant *certiorari* to address these important policy considerations.

II. The United States Needs Strong Laws to Prevent Terrorists and Other Human Rights Violators from Using the U.S. Banking System to Promote Nefarious Agendas.

As the U.S. Congress, the Executive Branch, multiple circuit courts, and the State of New York have repeatedly emphasized, robust banking laws prevent terrorism and human rights violations, and help secure American interests and citizens abroad and domestically. As discussed in more detail below, the U.S. Supreme Court should grant *certiorari* in this case to further this important policy goal by allowing for corporate liability under the ATS for terrorist acts.

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[14] *See* Daniel P. Stipano, Remarks Before the Florida International Bankers Association, at 11 (Feb. 10, 2005), ("Neither banks nor their regulators can be effective in this area by going it alone"), *available at* https://www.occ.gov/news-issuances/speeches/2005/pub-speech-2005-13.pdf (hereinafter "Stipano Remarks").

A. The U.S. Congress and Executive Branch Have Consistently Sought to Prevent Financial Institutions from Providing Banking Services to Terrorists and Other Human Rights Violators.

For over twenty (20) years, the U.S. Congress has expressed unfettered support for laws that prevent the funding of terrorism and human rights violations. For example, when Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), it found that "international terrorism is among the most serious transnational threats faced by the United States and its allies" and that "foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations."[15] In enacting the AEDPA, Congress sought to curtail this conduct.

In February 2001, just seven (7) months before the September 11th attacks, the Senate Permanent Subcommittee on Investigations issued a report titled "Correspondent Banking: A Gateway for Money Laundering" that further documented the prevalence of foreign banks using correspondent accounts in the United States to "facilitate[ ] illicit enterprises."[16] Thereafter the Senate held several days of hearings where financial experts detailed the threats to the United States caused by foreign banks attempting to

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[15] Pub. L. No. 104-132, §§ 301(a), 324, 110 Stat. 1214, 1247, 1254 (1996).

[16] *See* February 2001 Senate Report, at 1.

use U.S. financial institutions to facilitate criminal activity, including terrorism.[17]

Shortly after September 11, 2001, Congress enacted the Patriot Act to further deter terrorism and its funding. It strengthened the Bank Secrecy Act ("BSA"),[18] finding that "money laundering, and the defects in financial transparency on which money launderers rely, are critical to the financing of global terrorism and the provision of funds for terrorist attacks," and amended the statute "to increase the strength of United States measures to prevent, detect, and prosecute international money laundering and the financing of terrorism."[19]

Congressional hearings conducted just before the Act's passage confirmed that the Act would help "dismantle the financial infrastructure of terrorism" and "starve terrorists of funding."[20] Congress nevertheless acknowledged that while the Act would "give our law enforcement officials the additional tools they need to uncover and root out the financial infrastructure of terrorism, we also must make sure that the existing tools are being used effectively and wisely."[21]

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[17] *See generally* March Senate Hearings.

[18] The BSA is codified in subchapter II of chapter 53 of title 31 of the United States Code.

[19] Patriot Act, Pub. L. No. 107-56, §§ 302(a)-(b), 115 Stat. 272, 296-97 (2001).

[20] October House Hearings, at 1 (internal quotation marks omitted).

[21] *Id.* at 5.

In accordance with the Patriot Act, the Department of the Treasury ("DOT") enacted robust regulations designed to prevent foreign banks from using the United States banking system as a means to fund terrorists.[22]

As part of the rulemaking process, three "key authors" of the Act, Senator Charles Grassley, Senator John Kerry, and Senator Carl Levin, commented on the proposed regulations, urging for broadly applicable anti-money laundering and terrorist financing rules.[23] Their comments lamented that Osama bin Laden's new recruits knew the "cracks" in "Western financial systems" like they knew the "lines in their hands."[24] This observation had helped convince Congress to enact strong due diligence requirements in the Patriot Act.[25]

In keeping with the Congressional mandate it received, DOT agreed with the senators and adopted "broad" regulations despite arguments from the U.S. financial industry that "the compliance burden" would be too great.[26]

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[22] *See* Financial Crimes Enforcement Network; Anti-Money Laundering Requirements—Correspondent Accounts for Foreign Shell Banks; Recordkeeping and Termination of Correspondent Accounts for Foreign Banks, 67 Fed. Reg. 60562-60573 (Sept. 26, 2002) (codified at 31 C.F.R. pt. 103).

[23] *See generally* Senator Comment Letter.

[24] *Id.* at 1.

[25] *See id.*

[26] *See* 67 Fed. Reg. 60564. For example, in the March Senate Hearings noted above, James Christie, the Vice-President of Global Treasury Risk Management for Bank of America confirmed that the bank had completed almost 20,000 suspicious

Daniel P. Stipano, the Acting Chief Counsel of the Office of the Comptroller of the Currency confirmed in a 2005 speech that "BSA compliance is no longer just a matter of disrupting the proceeds of the drug trade . . . . [i]t is now also about preventing terrorist financing, a matter that directly affects the national security of the United States and the protection of its citizens."[27]

Yet just a few months later, Congress held hearings to address "[a] continuing series of instances of major banks . . . fail[ing] to comply with anti-money laundering statutes and regulation."[28] As an example, Senator Shelby cited "the New York branch of Arab Bank . . . for its failure to exercise due diligence with regard to its customer base" as some of the transactions carried out by Arab Bank "involved known terrorists and terrorist organizations" including "HAMAS and Al Qaeda."[29]

Senator Shelby's testimony references the DOT's civil enforcement proceedings against Arab Bank for violating the Bank Secrecy Act by "fail[ing] to implement an adequate anti-money laundering program . . . and manage risks of money laundering and terrorist financing in connection with the United

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activity reports in a given year and that this "does not come without a sizeable investment in technology and human resources." March Senate Hearings, at 23.

[27] Stipano Remarks, at 1.

[28] *See Money Laundering and Terror Financing Issues in the Middle East: S. Comm. on Banking, Housing, and Urban Affairs* (S. Hrg. 109-676), 109th Cong., at 1 (July 13, 2005) (Statement of Sen. Richard C. Shelby, Chairman).

[29] *Id.*

States dollar clearing transactions" that ultimately resulted in the imposition of a penalty against Arab Bank.[30]

A month earlier, Congress had conducted an additional hearing where it asked Julie Williams, the then chief counsel of the Office of Comptroller of the Currency, about Arab Bank's practice of using its American branch to process transactions for terrorist groups. Congress's purpose in eliciting this testimony was to "fully resolve[ ]" the issue "with a unified, fair response that will further strengthen efforts to secure the international financial system."[31]

Even as recently as September 28, 2016, in response to a huge populist movement to punish those responsible for supporting terrorism and deter future attacks, Congress enacted the Justice Against Sponsors of Terrorism Act ("JASTA") to:

> [P]rovide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly,

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[30] *See* Joint Release, Financial Crimes Enforcement Network Office of the Comptroller of the Currency, FinCEN and OCC Assess $24 Million Penalty Against Arab Bank Branch (Aug. 17, 2005), *available at* https://www.fincen.gov/news/news-releases/fincen-and-occ-assess-24-million-penalty-against-arab-bank-branch.

[31] *See Financial Services Regulatory Relief: Hearing Before H.R. Fin. Servs. Comm., Fin. Instit. & Consumer Credit Subcomm.*, 109th Cong., at 3 (June 9, 2005).

> to foreign organizations or persons that engage in terrorist activities against the United States.[32]

This purpose, repeated over and over again by Congressmen and Executive Branch officials alike for more than twenty (20) years, demonstrates the U.S. Government's consistent national policy to combat terrorism and its funding. Both Congress and the Executive Branch specifically condemned the banking practices of Arab Bank as practices that should and must be prevented, and Congress has encouraged the use of "existing tools" to deter terrorist funding going forward.[33] Yet, the Second Circuit's holding that the ATS does not apply to corporations strips victims of terror of one essential "existing tool[ ]" to combat terrorists and institutions like Arab Bank that aid and abet those terror groups. This Court should grant *certiorari* to address this issue.

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[32] Pub. L. No. 114-222, § 2, 130 Stat. 852, 852 (2016).

[33] *See* October House Hearings, at 5.

B. Numerous Circuit Courts Have Issued Decisions Designed to Deter Corporations from Assisting in or Perpetrating Acts of Terror or Other Human Rights Violations.

As discussed in the Petition for a Writ of *Certiorari*, many circuit courts have already concluded that corporations are amenable to suit under the ATS.[34] In doing so, many of these circuits' decisions recognized the ATS' important role in deterring human rights violations, including terrorism.[35] Indeed, even the U.S. Supreme Court has expressed this policy goal.[36]

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[34] *See, e.g.*, *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1021-22 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54-57 (D.C. Cir. 2011); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner, J.).

[35] *See, e.g.*, *Nestle USA*, 766 F.3d at 1019 (ATS claims have been found viable against defendants for "supporting terrorism," among other things); *Exxon Mobil*, 654 F.3d at 46, 55 (ATS enacted due to the "risk of losing respect abroad because [the United States] could not respond to violations of the law of nations" and noting the "deterrence rationale" in applying the ATS to corporations); *Flomo*, 643 F.3d at 1018 (corporate liability under the ATS deters violations of international law).

[36] *See Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring) (ATS liability protects American interests including the "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind"); s*ee also Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-20 (2004) (ATS enacted to permit enforcement of the law of nations and punish violators).

While every branch of the Federal Government, including the judiciary, has recognized the importance of the ATS in deterring violations of the law of nations, the Second Circuit's holding below, affecting the epicenter of this country's financial system, creates an arbitrary exception for when the violator happens to be a corporation. Even while most of the Second Circuit recognized that their holding arbitrarily limited the application of the ATS, the majority of the Circuit felt it more appropriate for the Supreme Court to decide the issue once-and-for-all.[37] In the meantime, foreign banks will continue to use New York as an end run around to avoid any possibility of ATS liability for illicit transactions. In light of the serious policy implications here, this Court should take the Second Circuit up on its invitation and grant *certiorari*.

C. New York State Has also Made Law to Prevent Banks from Supporting Terrorist Groups.

While Congress, the Executive Branch, and the circuit courts have worked to eliminate terrorist funding, New York State, where the Second Circuit sits, has sought to bolster its own regulations to prevent terror financing as well. Specifically, on June 30, 2016, the New York Department of Financial Services ("NYDFS"), an agency that regulates banks operating in New York, issued a Final Rule titled

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[37] *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015); *In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34, 47 (2d Cir. 2016) (Chin, J., dissenting from denial of rehearing *en banc*); *Id.* at 44-45 (Pooler, J., dissenting from denial of rehearing *en banc*).

"Banking Division Transaction Monitoring and Filtering Program Requirements and Certifications."[38] The regulation states, "the Department identified shortcomings in the transaction monitoring and filtering programs of [banking institutions investigated for compliance with BSA/Anti-Money Laundering laws and Office of Foreign Asset Control requirements] attributable to a lack of robust governance, oversight, and accountability."[39] Starting in 2017, the regulation will require compliance with monitoring and filtering programs at the bank level, reflecting the desire on the part of NYDFS to cut off the New York banking system from illicit criminal activity.

The New York Court of Appeals has also weighed in on the importance of enforcing U.S. laws on financial institutions abroad. In response to a certified question from the Second Circuit regarding whether New York's long-arm statute permitted jurisdiction over Lebanese Canadian Bank ("LCB") for its support of terrorist groups, the Court of Appeals stated:

> [R]epeated use of the correspondent account shows not only transaction of business, but an articulable nexus or substantial relationship between the transaction and the alleged breaches of statutory duties. LCB did not route a transfer for a terrorist group once or twice by mistake. Rather, plaintiffs allege that LCB deliberately used a New York account again and again to

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[38] *See* 3 N.Y.C.R.R. pt. 504 (2016).

[39] *See* 3 N.Y.C.R.R. § 504.1 (2016).

> effect its support of Shahid[40] and shared terrorist goals.[41]

The court held that New York courts had personal jurisdiction over the bank, noting that the "inquiry logically focuses on the defendant's conduct."[42]

In another terrorism case involving a bank that allegedly provided banking services to Hezbollah, a New York appellate court found that the case could proceed against the bank even though the Second Circuit had dismissed very similar allegations against American Express.[43]

Despite New York State's clear preference to hold banks to higher standards of conduct to prevent terrorist financing, the Second Circuit's blanket immunity for corporations sued under the ATS thwarts that objective by preventing victims of terror to hold financial institutions responsible that purposefully support terrorism and other activities that violate international law. This Court should bring the Second Circuit in line with New York State's policy objectives by allowing for corporate liability under the ATS.

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[40] The Shahid Foundation provides support for Hezbollah fighters and their surviving families.

[41] *Licci v. Lebanese Can. Bank, SAL*, 20 N.Y.3d 327, 340 (2012).

[42] *Id.*

[43] *Compare Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192 (1st Dep't 2013), *with*, *Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant Petitioners' writ of *certiorari* and reverse the decision below.

Respectfully submitted,

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